Supreme Court, U.S.
FILED
JUL 3 2001
CLERK

No. 00-1674

In The

Supreme Court of the United States

DOWELANCO; EPCO, INC.; and
ROFAN SERVICES, INC.,

Petitioners,

vs.

LIBBY SLEATH, MARY ANN HAYES,
GLENDA TRUESDELL, and MARY OWEN,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Montana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER MICHAEL MELOY
Counsel of Record
JENNIFER S. HENDRICKS
MELOY LAW FIRM
The Bluestone
80 South Warren, P.O. Box 1241
Helena, Montana 59624
(406) 442-8670

TOM SCHEUNEMAN
2550 Point del Mar
Corona del Mar, California 92625
(949) 721-8114

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. This Court Lacks Jurisdiction Because the Decision Below Is Not a Final Judgment 3

A. The Decision Below Is Not a Final Judgment 4

B. This Case Does Not Fall Within the Recognized Exceptions to the Final Judgment Rule 5

1. Reversal By This Court Would Not Terminate the Litigation on the Relevant Causes of Action 6

2. Awaiting Final Judgment Would Not Seriously Erode Any Federal Policy 8

II. The Question Presented Does Not Warrant This Court's Review 11

A. This Case Is a Poor Vehicle for Addressing FIFRA Preemption 12

B. The Decision Below Does Not Conflict With Any Decision of This Court 14

C. The Decision Below Was Correct 16

D. The Question Presented Is Not Ready for This Court's Review 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Ackerman v. Amer. Cyanamid Co., 586 N.W.2d 208 (Iowa 1998) 4

Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)..... 18

Andrus v. AgrEvo USA Co., 178 F.3d 395 (5th Cir. 1999)..... 19

Auer v. Robbins, 519 U.S. 452 (1997)..... 17

Belknap, Inc. v. Hale, 463 U.S. 491 (1983)..... 9

Brown v. Chas. H. Lilly Co., 985 P.2d 846 (Or. Ct. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000)..... 19

Calder v. Jones, 465 U.S. 783 (1988)..... 9

Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby, 958 F.2d 941 (9th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992)..... 12

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)..... 17

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)..... 14, 15, 16, 19

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).... *passim*

Eide v. E.I. du Pont de Nemours & Co., 542 N.W.2d 769 (S.D. 1996)..... 5

Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 2000).....10, 19

Florida v. Thomas, ___ U.S. ___, 121 S.Ct. 1905 (2001)..... 8

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) ...7, 9

Geier v. Amer. Honda Motor Co., 529 U.S. 861 (2000) 17

TABLE OF AUTHORITIES – Continued

Page

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 10

Higgins v. Monsanto Co., 862 F.Supp. 751 (N.D.N.Y. 1994) 18

Jefferson v. City of Tarrant, 522 U.S. 75 (1997) 3, 4, 9, 11

Kuiper v. Amer. Cyanamid Co., 131 F.3d 656 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998)..... 19

Local No. 438, Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963) 9

Lorillard Tobacco Co. v. Reilly, ___ U.S. ___, 2001 WL 721016 (June 28, 2001) 14, 17

Mkt. St. Ry. Co. v. R.R. Comm'n, 324 U.S. 548 (1945) 4

McAlpine v. Rhone-Poulenc Ag Co., 947 P.2d 474 (Mont. 1997)..... 2, 3, 15

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 3, 14, 15, 16, 19

Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 9

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 9, 10

N.Y. State Pesticide Coalition, Inc. v. Jorling, 874 F.2d 115 (2nd Cir. 1989) 12

Nat'l Bank of Commerce v. Dow Chem. Co., 165 F.3d 602 (8th Cir. 1999).....4, 19

Nat'l Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) 9

Nathan Kimmel, Inc. v. DowElanco, 64 F.Supp.2d 939 (C.D. Cal. 1999) 19

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)..... 9

Pitts v. Dow Chem. Co., 859 F.Supp. 543 (M.D. Ala. 1994)..... 6

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 16

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 7

Shaffer v. Heitner, 433 U.S. 186 (1977)..... 9

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 17

Sleath v. West Mont Home Health Servs., Inc., 16 P.3d 1042 (Mont. 2000) 19

Southland Corp. v. Keating, 465 U.S. 1 (1984) 9

Sternhagen v. Dow Co., 935 P.2d 1139 (Mont. 1997) 6

United States v. Mead, ___ U.S. ___, 121 S.Ct. 2164 (2001) 17, 18

Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 12, 15

Worm v. Amer. Cyanamid Co., 970 F.2d 1301 (4th Cir. 1992) 4

Worm v. Amer. Cyanamid Co., 5 F.3d 744 (4th Cir. 1993)..... 5

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. art. VI (Supremacy Clause)..... 10

U.S. CONST. amend. I..... 9

7 U.S.C. § 136v(b) 2, 15, 16, 19

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 1335(b) 14

28 U.S.C. § 1257 ..... 1, 3, 4

RULES

MONT. R. CIV. PROC. 54(b) 2

MONT. R. EVID. 202 10

OTHER AUTHORITY

Chlorpyrifos; End-Use Prods. Cancellation Order, 66 Fed. Reg. 7753 (2001) 2

JURISDICTION

DowElanco contends the Court has jurisdiction under 28 U.S.C. § 1257. DowElanco admits the decision below is not a final judgment but argues this Court should nonetheless exercise jurisdiction under the fourth exception described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The inapplicability of that exception is discussed below, as the first reason for denying the writ.

STATEMENT OF THE CASE

Respondents Libby Sleath, Mary Ann Hayes, Glenda Truesdell, and Mary Owen (collectively "Ms. Sleath") brought this action against DowElanco, among other defendants, to recover for injuries caused by a DowElanco pesticide called Dursban. The active ingredient in Dursban is chlorpyrifos, an organophosphate and a chemical relative of the nerve gases used in World Wars I and II. Dursban also contains other organophosphates listed on the label as "inert" ingredients. (App. A to DowElanco's petition, pp. 3a-4a.)

Organophosphates, including chlorpyrifos and the "inert" Dursban ingredients, are central and peripheral nervous system poisons. They can cause numerous injuries and symptoms, including headache, dizziness, flu-like malaise, urinary frequency, confusion, and difficulties with memory and concentration. After Dursban was repeatedly applied inside the respondents' workplace without their knowledge, each of them developed some or all of these symptoms. (App. A to petition, p. 4a; Compl. ¶¶ 13, 18-19.)

The EPA recently banned almost all uses of Dursban because of its adverse effects on human health and the environment. *Chlorpyrifos; End-Use Prods. Cancellation Order*, 66 Fed. Reg. 7753 (2001).

The Complaint in this case states causes of action under Montana law for negligence, strict liability due to design defect, and breach of implied and express warranties. Ms. Sleath's express warranty claim is based on the Dursban labels, which included the statement,

> DowElanco warrants that this product conforms to the chemical description on the label and is reasonably fit for the purposes stated on the label when used in strict accordance with the directions, subject to the inherent risks set forth below.

(App. A to petition, p. 4a.) The trial court was therefore bound to follow the Montana Supreme Court's decision in *McAlpine v. Rhone-Poulenc Ag Co.*, 947 P.2d 474 (Mont. 1997), and find the express warranty claim preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136v(b). (App. B to petition, pp. 35a-36a.) The trial court went further, however, accepting DowElanco's argument that all claims, including the design defect claim, are in some way "based on" the labels. (App. B to petition, pp. 36a-42a.) The court therefore granted DowElanco's motion for summary judgment on all claims.

The trial court certified the preemption question for interlocutory appeal to the Montana Supreme Court under Montana Rule of Civil Procedure 54(b). The Montana Supreme Court reversed. It noted it had decided *McAlpine* without considering this Court's decision in

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), and upon re-examining the question it found *McAlpine* to be mistaken. (App. A to petition, p. 18a.) The court concluded that FIFRA does not preempt any of Ms. Sleath's claims. It therefore did not reach the question of which particular claims are "based on" the pesticide labels, and it remanded for trial.

DowElanco asks this Court to issue a writ of certiorari to consider whether FIFRA's labeling provisions preempt state common law causes of action "based on" a pesticide's labeling. If the Court rules in its favor, DowElanco asks that this case be remanded to the Montana Supreme Court for determination of whether the design defect, negligence, and implied warranty claims are label-based.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction Because the Decision Below Is Not a Final Judgment.

The decision below is "avowedly interlocutory," *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997), and is not a final judgment for purposes of 28 U.S.C. § 1257. The *Cox* exception relied upon by DowElanco does not apply because immediate review would not terminate litigation on all relevant causes of action and because adherence to the final judgment rule would create no serious threat to federal policy.

A. The Decision Below Is Not a Final Judgment.

"To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' " *Jefferson*, 522 U.S. 75, 81 (1997) (quoting *Mkt. St. Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 551 (1945)). The final judgment rule minimizes this Court's interference with state litigation and promotes the orderly conduct of litigation. When "[r]esolution of the state-law claims could effectively moot the federal questions," *Jefferson*, 522 U.S. at 82, a writ of certiorari is unnecessary and therefore beyond the scope of jurisdiction authorized by § 1257.

DowElanco asks this Court to decide the general question of whether FIFRA preempts common law claims "based on" a pesticide's label. It suggests that the case then be remanded to the Montana Supreme Court to determine which of Ms. Sleath's claims are label-based. Of course, the decision on remand will be just as much a "final judgment," in DowElanco's view, as the one currently submitted for review. If the Montana Supreme Court were to hold that the design defect claim, for example, is not based on the label, DowElanco would then have, in its view, yet another "final judgment" on which to petition for a writ of certiorari. *See Ackerman v. Amer. Cyanamid Co.*, 586 N.W.2d 208, 215 (Iowa 1998) (design defect claims are not preempted by FIFRA); *see also, e.g., Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 607 (8th Cir. 1999) (same); *Worm v. Amer. Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir. 1992) (same), *reaffirmed*

after remand, 5 F.3d 744, 747 (1993); *Eide v. E.I. du Pont de Nemours & Co.*, 542 N.W.2d 769, 772 (S.D. 1996) (same). After trial, Dow could file yet another appeal, claiming that the facts as proved at trial show that even the design defect claim was "really" label-related all along. In DowElanco's view, then, this litigation can be "final" in the state courts at least three times before it is actually concluded.

B. This Case Does Not Fall Within the Recognized Exceptions to the Final Judgment Rule.

In *Cox*, this Court held that it may treat an interlocutory state-court decision as final in four types of circumstances. The first three are when the "federal issue is conclusive or the outcome of further proceedings preordained"; when the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings"; and when later review of the federal issue will be foreclosed regardless of the outcome of the case. *Cox*, 420 U.S. at 479-81. DowElanco concedes that none of these first three exceptions applies. It relies instead on the fourth exception:

> [1] where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and [2] where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . , if a refusal immediately to review the state court decision might seriously erode federal policy.

Cox, 420 U.S. at 482-83.

Only the first component of the fourth *Cox* exception is met in this case. As to the second component of the fourth exception, although the Montana Supreme Court has finally decided the federal issue, reversal of its decision will not terminate litigation on the relevant causes of action, and honoring the final judgment rule in this case will pose no serious threat to federal policy. Therefore, the fourth exception does not apply, and this Court lacks jurisdiction to grant DowElanco's petition.

1. Reversal By This Court Would Not Terminate the Litigation on the Relevant Causes of Action.

DowElanco argues that a ruling in its favor on the question presented would preclude further litigation on the express warranty claim. (Pet. p. 2 n. 1.) That claim, however, is not the only relevant cause of action. DowElanco's position is that *all* Ms. Sleath's claims – express warranty, implied warranty, negligence, and design defect – are preempted. All four claims are therefore "relevant" to the petition.

Ms. Sleath agrees with DowElanco that, if this Court were to reverse, the individual claims would need to be examined in the first instance by the state court. Whether Ms. Sleath's claims are "label-based" depends on what she must prove. *See, e.g., Pitts v. Dow Chem. Co.*, 859 F.Supp. 543 (M.D. Ala. 1994) (analyzing elements of state-law claim to determine whether preempted). For example, the fact that Montana does not recognize a state-of-the-art defense to strict liability, *see Sternhagen v. Dow Co.*, 935 P.2d 1139 (Mont. 1997), is relevant to whether the

design defect claim impermissibly invades the federal sphere. Analysis of that claim would also be affected by the EPA's recent order recognizing the dangers of Dursban. Thus, even if DowElanco were to prevail here, the federal preemption question would remain alive in this litigation, and this Court could expect another petition – from either DowElanco or Ms. Sleath – asking for review of the Montana court's conclusions regarding which particular claims are preempted. Because three causes of action to which DowElanco claims a preemption defense would continue to be litigated even if DowElanco were to prevail in this Court, the fourth *Cox* exception is not satisfied. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633 (1981) (state-court decision finding a taking of property non-final because court remanded for determination of compensation); *Cox*, 420 U.S. at 477 ("In most, if not all, of the cases in these categories, [the] additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date.").

DowElanco's reliance on *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), to avoid this problem is misplaced. The petitioner there had asserted a First Amendment defense to prosecution under Indiana's RICO statute. He was charged with six obscenity violations in addition to the two RICO counts, but he "rais[ed] no objection to the obscenity indictments," challenging only the constitutionality of the RICO charges. *Fort Wayne Books*, 489 U.S. at 54. A ruling in his favor by this Court would have precluded any further litigation on the two counts to which the question presented for certiorari was relevant. Although the six obscenity counts remained,

they had nothing to do with the question presented to this Court, and the fourth *Cox* requirement was satisfied. That requirement would be satisfied in this case only if DowElanco were to abandon its preemption defense to Ms. Sleath's design defect, negligence, and implied warranty claims. *Cf. Florida v. Thomas*, ___ U.S. ___, 121 S.Ct. 1905, 1909 (2001) (holding *Cox* did not apply because "the State has not conceded that the search is invalid," despite respondent's concession at oral argument that affirmance would, as a practical matter, end case). Because it has not done so, a decision in DowElanco's favor on the question presented would lead inevitably to further litigation on its preemption defense.

2. Awaiting Final Judgment Would Not Seriously Erode Any Federal Policy.

This case also falls outside the exception because postponing review until final judgment would not seriously erode federal policy. Unless a case triggers some special federal policy "that is not common to all run-of-the-mine decisions" interpreting federal law, a petitioner "can make no claim of serious erosion of federal policy." *Florida v. Thomas*, 121 S.Ct. at 1910. The cases this Court has accepted under the fourth *Cox* exception have involved a very few federal policies, none of which is involved here. Accepting review at this juncture would allow the fourth *Cox* exception to swallow the final judgment rule.

The Court has found a danger to important federal policies in cases involving questions of jurisdiction and venue, in which the petitioner claims a federal policy

protects it from the jurisdiction asserted by the state tribunal. For example, in *Local No. 438, Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963), which was discussed in *Cox* as an example of the fourth exception, the state court had enjoined union picketing despite the claim that the National Labor Relations Board had exclusive jurisdiction over the controversy. This action threatened to erode national labor policy requiring the Board to oversee such disputes, and the issue of the state court's power to proceed was, in effect, separable from the merits. *See also, e.g., Calder v. Jones*, 465 U.S. 783, 788 n. 7 (1988); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n. 5 (1983); *Shaffer v. Heitner*, 433 U.S. 186, 195 n. 12 (1977); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963).

A few cases, including *Curry* and *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 n. 7 (1987), have suggested that the time-dependent nature of a case may weigh in favor of accepting review under the fourth exception. In *Jefferson*, however, the Court limited *Ritchie* to its facts, indicating that the urgency of the question to the parties would not necessarily satisfy the requirement that the state-court decision threaten to erode federal interests. *Jefferson*, 522 U.S. at 83-84. Here, there is nothing time-sensitive; indeed, DowElanco has yet to be held liable on any claim, and the decision below does not alter the status quo.

First Amendment issues, including those raised in *Cox* itself, figure prominently under the fourth exception. *See, e.g., Fort Wayne Books*, 489 U.S. 46; *Nat'l Socialist Party v. Village of Skokie*, 432 U.S. 43, 53 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). Like the over-breadth doctrine, the Court's review of First Amendment

cases before final judgment reflects its willingness to construe jurisdictional doctrines broadly in order to prevent "chilling" of protected speech. *See Cox*, 420 U.S. at 484-85 (discussing *Tornillo*). No such policy is at issue here.

Finally, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), this Court applied the fourth *Cox* exception because the interests of the federal government were directly at stake. *Goodyear Atomic* involved state regulation of a federal facility – "the only nuclear facility producing nuclear fuel for the Navy's nuclear fleet." *Goodyear Atomic*, 486 U.S. at 180. As a general rule, such regulation violates the Supremacy Clause. The state statute was saved only because Congress had authorized the regulation. Contrary to DowElanco's argument, *Goodyear Atomic* does not stand for the proposition that all state decisions rejecting preemption defenses pose serious threats to federal policy and require immediate review.

DowElanco also suggests that the *reasoning* of the Montana Supreme Court's decision itself poses a threat to some federal policy. In particular, Dow attacks the Montana court's reliance on the government *amicus* brief. That brief was filed by the United States Department of Justice, representing the EPA, in *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000), and thus required the concurrence of the Solicitor General. The Montana Supreme Court properly took judicial notice of the government's views under Montana Rule of Evidence 202. (Order, 8/26/99, denying DowElanco's motion to strike.) DowElanco's petition does not challenge the decision to take judicial notice. Even if it were correct that the Montana

Supreme Court gave undue consideration to the government's views, such an error would not create a jurisprudential crisis or undermine any federal policy. The only risk cited by DowElanco is that other courts might find Montana's reasoning persuasive. The danger, then, for DowElanco, is that the decision below will cause other jurisdictions to consider the government's perspective and perhaps reach a conclusion similar to Montana's. Although this possibility threatens DowElanco's claimed immunity from liability, it fails to constitute a threat to federal policy. *See also infra* at part II.D.

"This case, still *sub judice* in [Montana], was brought to this Court too soon." *Jefferson*, 522 U.S. at 484. The decision below poses no threat to any of the federal policies this Court has identified as qualifying for the fourth *Cox* exception. In light of the EPA's position on preemption, the Court can be assured there is no imminent danger to that agency's ability effectively to carry out its regulatory duties. A ruling in DowElanco's favor by this Court would only trigger further litigation of DowElanco's preemption defense. This Court should therefore dismiss the petition for lack of jurisdiction.

II. The Question Presented Does Not Warrant This Court's Review.

The question presented in the petition is unworthy of review because the preemption issue in this case is narrow, because there is no conflict with any decision of this Court, because the decision below was correct, and because the Court should allow further percolation in the

lower courts before acting on the issue of FIFRA preemption actually presented by this case.

A. This Case Is a Poor Vehicle for Addressing FIFRA Preemption.

Granting a writ of certiorari in this case will not allow the Court definitively to resolve issues surrounding FIFRA preemption of common law claims because the preemption issue in this case is exceptionally narrow in three ways.

First, Ms. Sleath and the other plaintiffs were innocent bystanders to the use of Dursban at their workplace. They were not the pesticide applicators or users to whom EPA regulations and the labels on the product were directed. These plaintiffs never saw the labels, nor were they intended to. Thus, they have failure-to-warn claims based on the failure to provide point-of-use warnings, rather than on the EPA-regulated labels. This Court has already held that a state or local government can require point-of-use warnings for pesticides with EPA-registered labels. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 603 (1991) (holding that local ordinance could require "placards giving notice of the pesticide use and of any label information prescribing a safe reentry time"). The courts of appeals have also recognized the distinction between labels and point-of-use warnings, and they have concluded that state requirements governing the latter are not preempted. *Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941 (9th Cir. 1992) (holding consumer notification requirements were not preempted), *cert. denied*, 506 U.S. 825 (1992); *N.Y. State Pesticide Coalition*,

Inc. v. Jorling, 874 F.2d 115, 199 (2nd Cir. 1989) ("FIFRA 'labeling' is designed to be read and followed by the end user. . . . By contrast, the target audience of the New York notification program is those innocent members of the general public who may unwittingly happen upon an area where strong poisons are present as well as those who contract to have pesticides applied."). Thus, there is no split of appellate authority on this question, which is narrower than the issue of whether a pesticide applicator or user, who had read the labels, could bring common law claims against the manufacturer.

Second, Ms. Sleath's failure-to-warn claims are premised in large part on DowElanco's failure to act on information it acquired *after* Dursban was registered with the EPA. This fact significantly narrows the preemption question because it means Ms. Sleath's claims do not involve any attack on the EPA's regulatory decision, based on the information available at the time of registration.

Finally, particularly in light of the EPA's recent order recognizing the dangers of chlorpyrifos, Ms. Sleath's claim that Dursban is unreasonably dangerous does not conflict with any action or policy of the EPA. Contrary to DowElanco's suggestion that a jury's decision in a common law action is based on "inadequate information" (Pet. p. 26), the jury in this case will have much more information about Dursban than the EPA did when it initially allowed DowElanco to register the label. Dursban's current status, the narrowness of the preemption issue in this case, and the fact that this Court has already spoken on the issue of point-of-use warnings, make this case a poor vehicle for the Court to develop an

analysis of FIFRA preemption that will be helpful to the lower courts.

B. The Decision Below Does Not Conflict With Any Decision of This Court.

Far from conflicting with this Court's decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Medtronic*, the Montana Supreme Court's decision was a faithful application of the teachings of those cases. DowElanco argues *Cipollone* and *Medtronic* held that the word "requirements" in a preemption clause of a federal statute always results in broad preemption of common law claims. DowElanco is correct that *Cipollone* held that the Public Health Cigarette Smoking Act's prohibition of any "requirement or prohibition . . . under State law," 15 U.S.C. § 1335(b), preempted a common law claim for failure to warn. *Cipollone*, 505 U.S. at 521. At the same time, however, the Court held that an earlier version of the same statute – stating, "[no] statement relating to smoking and health . . . shall be required" – did *not* preempt common law claims. *Medtronic*, 518 U.S. at 488, n. 8 (discussing *Cipollone*, 505 U.S. at 518-20). Determining the scope of each preemption clause required careful analysis of the statutory text and congressional intent. The Court's recent decision in *Lorillard Tobacco Co. v. Reilly*, ___ U.S. ___, 2001 WL 721016 (June 28, 2001), drew on *Cipollone*, dealt with positive enactments of state law rather than common law damages actions, and reaffirmed this approach by its detailed attention to congressional intent with respect to cigarette labeling.

DowElanco is correct that many lower courts, including the Montana Supreme Court in *McAlpine*, subsequently applied the first holding of *Cipollone* mechanically to find preemption of all common law claims wherever the word "requirement" appeared. This Court's decision in *Medtronic* demonstrated again that preemption analysis requires consideration of the particular statute, not wholesale incorporation of conclusions from another context. In *Medtronic*, a majority of the Court held that the reference to "requirements" in the Medical Device Act did not preempt the petitioner's manufacturing and labeling claims, nor did it preempt claims premised on violations of federal regulations. *Medtronic*, 518 U.S. at 494-502. The Court was unanimous in concluding that the design defect claim was not preempted. *Medtronic*, 518 U.S. at 492-94; *id.* at 513 (O'Connor, J., concurring in part and dissenting in part).

The Montana Supreme Court heeded the teaching of *Medtronic* by re-visiting *McAlpine*. It examined the text of § 136v(b) and of FIFRA as a whole. (App. A to petition, pp. 11a-12a, 21a-23a.) It noted, for example, that outside of § 136v(b) the word "requirements" appears in FIFRA seventy-four times, in each instance referring only to enactments of positive law. (App. A to petition, p. 22a.) It considered the views of the agency charged with administering the Act. (App. A to petition, pp. 15a-16a.) It compared the effects of common law damages actions to the types of regulation FIFRA, as interpreted in *Mortier*, expressly authorizes states to impose. (App. A to petition, p. 23a.) Because the teaching of both *Cipollone* and *Medtronic* is that a claim of preemption requires just this

kind of analysis, the decision below does not conflict with any decision of this Court.

C. The Decision Below Was Correct.

In addition to applying faithfully the tenets of *Cipollone* and *Medtronic*, the Montana Supreme Court's decision was correct. A full discussion of the merits is beyond the scope of this brief, but a few points deserve comment.

When Congress legislates in a field traditionally occupied by the states, this Court presumes " 'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption applies to the scope as well as the fact of preemption. *Id.* Despite DowElanco's extensive discussion of the legislative history of FIFRA, it does not claim to have discovered there evidence of a clear and manifest intent to preempt common law claims. DowElanco attacks the Montana Supreme Court's conclusion that Congress appeared to assume common law claims would survive § 136v(b), but the most it can claim is that the legislative history is inconclusive. In the court below, it asserted that "Congress did not specifically consider" preemption of common law claims when it debated FIFRA. (Supp. Br. of Resps., 9/17/99, p. 12.) Given the presumption against preemption, an inconclusive legislative history does not help DowElanco. Rather, it requires the conclusion that common law claims are permitted by § 136v(b). Because DowElanco cannot seriously argue that the common law claims asserted here directly conflict with federal law or that Congress has occupied the

field, Ms. Sleath's claims are not preempted. *See Lorillard*, 2001 WL 721016, *10 (noting three ways in which preemption can arise).

Second, the Montana Supreme Court was correct to give consideration to the government's views. This Court recently reaffirmed that the government's views can properly be considered in helping a court with its task. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Solicitor General submitted a brief explaining the Department of Transportation's position in favor of preemption. The Court held those views were entitled to weight, even though they were expressed in litigation rather than formal rulemaking:

> We have no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than "the agency's fair and considered judgment on the matter." . . . The failure of the Federal Register to address pre-emption explicitly is thus not determinative.

Geier, 529 U.S. at 884 (quoting *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)). Even more recently, the Court noted that the "well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *United States v. Mead*, ___ U.S. ___, 121 S.Ct. 2164, 2170 (2001) (distinguishing *Chevron* deference from *Skidmore* deference, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Although the Montana Supreme Court did not have the benefit of this Court's opinion in *Mead*, and thus couched its discussion solely in terms of *Chevron*, it did not simply

adopt the government's views. Rather, it conducted its own analysis, giving the government's brief "respect according to its persuasiveness." *Mead*, 121 S.Ct. at 2168. That brief is not merely the litigating position of government attorneys for the simple reason that the EPA is not suing or being sued. The Montana court properly considered the federal government's views.

Finally, on the EPA-approved label attached to containers of Dursban, DowElanco voluntarily warranted the safety of the product. That DowElanco proposed such a label and the EPA approved it demonstrates that both believed a warranty was possible. If DowElanco's preemption argument were correct, FIFRA would render DowElanco legally incompetent to make a warranty, since any warranty could never be enforced. *Cf. Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995) (federal preemption did not "shelter airlines from suits alleging no violation of state-imposed regulations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings"); *Higgins v. Monsanto Co.*, 862 F.Supp. 751, 761 (N.D.N.Y. 1994) ("[A] warranty does not lose its voluntary quality through EPA approval [under FIFRA]."). Both DowElanco and the EPA understood that Congress did not intend to deprive injured people of their right to recover damages from the manufacturer of a pesticide. Therefore, the Montana Supreme Court's decision was correct.

D. The Question Presented Is Not Ready for This Court's Review.

The EPA's public stance on FIFRA preemption has prompted action from other courts besides Montana's. As discussed above, the courts that have taken DowElanco's position in the past have done so by mechanically applying a portion of the holding in *Cipollone* to FIFRA. The "overwhelming authority" cited by DowElanco consists largely of those same courts adhering to prior decisions without undertaking a thorough review of the statute. *See, e.g., Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 398-99 (5th Cir. 1999); *Nat'l Bank*, 165 F.3d at 608; *Kuiper v. Amer. Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). A closer analysis of *Medtronic* and consideration of the government's brief has led both Montana and Oregon to conclude that common law claims are not preempted by § 136v. *Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000); *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000). A federal district court has reached the same conclusion and urged its court of appeals to reconsider the question. *Nathan Kimmel, Inc. v. DowElanco*, 64 F.Supp.2d 939, 944 (C.D. Cal. 1999). Only the California Supreme Court, in a 4-3 decision, has adhered to preemption after considering the government's position. *Etcheverry*, 993 P.2d 366. Other courts should have the opportunity to weigh in on this matter. The fact that the lower courts are engaged in a developing debate over FIFRA preemption, and that the Montana Supreme Court's decision in this case may contribute to and influence the direction of that debate, is a reason for

this Court to wait until the arguments have been more fully dissected by the states and by the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied for lack of jurisdiction and because the question presented is not worthy of review.

Respectfully submitted,

PETER MICHAEL MELOY
Counsel of Record
JENNIFER S. HENDRICKS
MELOY LAW FIRM
The Bluestone
80 South Warren, P.O. Box 1241
Helena, Montana 59624
(406) 442-8670

TOM SCHEUNEMAN
2550 Point del Mar
Corona del Mar, California 92625
(949) 721-8114

Attorneys for Respondents